Nos. 13-354; 13-356

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IN THE

Supreme Court of the United States

KATHLEEN SEBELIUS, SECRETARY OF HEALTH & HUMAN SERVICES, *et al.*,

Petitioners,

v.

HOBBY LOBBY STORES, INC., *et al.*,

Respondents.

CONESTOGA WOOD SPECIALTIES CORP., *et al.*,

Petitioners,

v.

KATHLEEN SEBELIUS, SECRETARY OF HEALTH & HUMAN SERVICES, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE TENTH AND THIRD CIRCUITS

BRIEF OF *AMICUS CURIAE* JUDICIAL EDUCATION PROJECT IN SUPPORT OF HOBBY LOBBY STORES, INC., & CONESTOGA WOOD SPECIALTIES CORP., ET AL.

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae the Judicial Education Project ("JEP") is dedicated to strengthening liberty and justice in America through defending the Constitution as envisioned by its Framers: creating a federal government of defined and limited power, dedicated to the rule of law and supported by a fair and impartial judiciary. JEP educates citizens about these constitutional principles and focuses on issues such as the judiciary's role in our democracy, how judges construe the Constitution, and the impact of court rulings on the nation. JEP's education efforts are conducted through various outlets, including print, broadcast, and internet media.

SUMMARY OF ARGUMENT

Under the Religious Freedom Restoration Act, Pub. L. 103-141, § 2 (1993) (codified at 42 U.S.C. § 2000bb *et seq.*) ("RFRA"), the government many only create substantial burdens on religion when in furtherance of a compelling interest. The First Amendment, similarly, requires strict scrutiny and the identification of a compelling government interest when a law that is not generally applicable burdens religious freedom. Thus, whichever analytical framework this Court ultimately applies in these cases, the issue of compelling interest will be central.

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1. Counsel for both parties have consented to the filing of this *amicus* brief. The government and Petitioners Conestoga Wood Specialties, Inc., *et al.* have filed blanket consent with the Court, and the written consent of Respondents Hobby Lobby Stores, Inc., *et al.* accompanies this brief. No counsel for a party authored this brief in whole or in part. No person, other than *amicus curiae*, its members, or its counsel, made a monetary contribution that was intended to fund preparing or submitting this brief.

The government, however, does not demonstrate any compelling interest that would justify overriding religious objections to force an employer to pay for the contraceptives used by his or her employees.

To begin with, interests in regulatory uniformity routinely fail strict scrutiny because the recognition of a general compelling interest in the uniformity of laws would eviscerate the many constitutional protections (and statutes like RFRA) that rely on the strict scrutiny framework for their vitality. Recognition of a compelling interest in uniformity would be particularly incongruous in the context of RFRA, which was enacted precisely to restore a system of accommodations for religious practice under generally applicable laws.

A governmental interest in uniformity should be met with particular skepticism here because the Affordable Care Act ("ACA") is nonuniform *by design*, especially when it comes to the contraceptive mandate. Even by conservative estimates, the law fails to require contraceptive coverage for millions of individuals who work for small employers and for millions more with "grandfathered" pre-ACA plans. The government has further undermined its interest in uniformity by granting numerous exemptions for secular reasons.

The government's backup argument, that it has a compelling interest in the uniform availability of private actions under the Employment Retirement Income Security Act (ERISA), fares no better. RFRA by its terms applies to *every* federal statute, passed both previously and subsequently to it, unless a subsequent statute explicitly

states otherwise. To allow laws creating private rights of action to trump RFRA's strict scrutiny requirement flies in the face of both the text and intent of RFRA.

The government also advances hazy interests in public health and equal access to preventative health care services. But those claims are both too general and unparticularized to be considered compelling. First, the duty to preserve public health is traditionally a function of state government and not the federal bureaucracy, but even if it were otherwise, these interests are only loosely connected with the scheme at issue in this case: the provision of a particular set of contraceptives by third parties with no cost to the consumer. Finally, any interest in equal access to recommended health services, whatever that means, hardly touches on the real, concrete issue in this case, which is requiring third-party payment for a subset of contraceptives.

ARGUMENT

Under the Free Exercise Clause and RFRA, the federal government must satisfy strict scrutiny when it substantially burdens free religious exercise. *See Sherbert v. Verner*, 374 U.S. 398, 406-07 (1963) (where laws are not neutral and generally-applicable); Religious Freedom Restoration Act of 1993, Pub. L. 103-141, § 2 (1993) (codified at 42 U.S.C. § 2000bb) (all federal law). The government must show that the interests justifying the federal bureaucracy limiting religious expression or coercing violations of conscience are compelling, and that the government has chosen the least restrictive means to achieve its goals. *Gonzales v. O Centro Espirita*

Beneficente Uniao do Vegetal, 546 U.S. 418, 424 (2006) (hereinafter "*O Centro*"); *Sherbert*, 374 U.S. at 407-08 (even if compelling interest exists, government must prove "that no alternative forms of regulation would combat such abuses without infringing First amendment rights."). The Court must "searchingly examine" each asserted interest in to ensure that it is truly "compelling." *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972). The religious conscientious objectors ("Religious Claimants") in these cases have pursued theories under both the Free Exercise Clause and RFRA. Although strict scrutiny applies in the same way under the Free Exercise Clause and RFRA, the following discussion will focus on a single issue: whether the government has shown a compelling interest in the contraceptive mandate of the Affordable Care Act, Pub. L. 111-148, § 2713 (2010) (codified at 42 U.S.C. § 300gg-13).

The government's asserted interests are not compelling. Despite the government's invocation of a disfavored uniformity interest in the ACA's contraceptive mandate, the mandate does not apply either uniformly or comprehensively, excluding millions of individuals from coverage requirements entirely, exempting millions of small employers from the contraceptive mandate, allowing indefinite continuation of millions of noncompliant "grandfathered" plans, and creating individualized exemptions of various types. Nor does the government have a compelling interest either in conferring a statutory right to free contraceptives provided by third-parties or in private-party enforcement of the mandate through the ERISA. Moreover, the government's asserted interests in equal access to preventive services are too general and unparticularized to qualify as compelling. Consequently, the government has yet to show a compelling interest in

forcing religious conscientious objectors generally, much less these Religious Claimants, to violate the tenets of their faith through the contraceptive mandate.[2]

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2. No court reaching the compelling interest issue has concluded that the government's asserted interests supporting mandatory third-party funding of contraceptives are compelling. *See Gilardi v. U.S. Health & Hum. Svcs.*, 733 F.3d 1208, 1219-24 (D.C. Cir. 2013); *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1143-44 (10th Cir. 2013); *Korte v. Sebelius*, 735 F.3d 654, 685-87 (7th Cir. 2013); *Newland v. Sebelius*, No. 12-1380, 2013 U.S. App. LEXIS 20223, at *10 (10th Cir. Oct. 3, 2013) (citing *Hobby Lobby Stores, Inc.*, 723 F.3d at 1121, 1128, 1142-43); *Ave Maria Found. v. Sebelius*, No. 13-cv-15198, 2014 U.S. Dist. LEXIS 3516, at *18-*20 (E.D. Mich. Jan. 13, 2014); *Catholic Diocese of Beaumont v. Sebelius*, No. 1:13-cv-709, 2014 U.S. Dist. LEXIS 467, at *25-*26 (E.D. Tex. Jan. 2, 2014); *Beckwith Electric Co. v. Sebelius*, No. 8:13-cv-648-T-17MAP, 2013 U.S. Dist. LEXIS 94056, at *58, (M.D. Fla. June 25, 2013); *E. Tex. Baptist Univ. v. Sebelius*, No. H-12-3009, 2013 U.S. Dist. LEXIS 180727, at *69-*73 (E.D. Tex. Dec. 27, 2013); *Geneva Coll. v. Sebelius*, 941 F. Supp. 2d 672, 683-85 (W.D. Pa. 2013); *Geneva Coll. v. Sebelius*, 929 F. Supp. 2d 402, 433-35 (W.D. Pa. 2013) (nonprofit and for-profit), *modified in part by Geneva Coll. v. Sebelius*, 2013 U.S. Dist. LEXIS 179476, at *44-*46 (W.D. Pa. Dec. 23, 2013) (nonprofit); *Monaghan v. Sebelius*, 931 F. Supp. 2d 794, 806-07 (E.D. Mich. 2013); *Roman Catholic Archbishop of Wash. v. Sebelius*, Civil Action No. 13-1441, 2013 U.S. Dist. LEXIS 179317, at *33 (D.D.C. Dec. 20, 2013) (citing *Gilardi*, 733 F.3d at 1217); *Roman Catholic Archdiocese of N.Y. v. Sebelius*, No. 12 Civ. 2542, 2013 U.S. Dist. LEXIS 176432, at *51-*59 (E.D.N.Y. Dec. 16, 2013); *S. Nazarene Univ. v. Sebelius*, No. CIV-13-1015-F, 2013 U.S. Dist. LEXIS 179569, at *26-*30 (W.D. Okla. Dec. 23, 2013); *Zubik v. Sebelius*, No. 13cv1459, 2013 U.S. Dist. LEXIS 165922, at *88-*96 (W.D. Pa. Nov. 21, 2013); *Am. Pulverizer Co. v. Sebelius*, No. 12-3459-CV-S-RED, 2012 U.S. Dist. LEXIS 182307, at *13-*14 (W.D. Mo. Dec. 20, 2012); *Legatus v. Sebelius*, 901 F. Supp. 2d 980, 991-995 (E.D. Mich. 2012); *Tyndale House Publrs., Inc. v. Sebelius*, 904 F. Supp. 2d 106, 125-29 (D.D.C.

I. The government has failed to articulate a compelling interest in uniformity

A. Interests in regulatory uniformity are disfavored under RFRA and the Free Exercise Clause

The government's asserted interest in uniformity—in generally foreclosing exceptions to a law—must make a particularly strong showing to be recognized as compelling. The very purpose of RFRA was to restore a system under which the government was encouraged to create exceptions to accommodate freedom of religion. One unfortunate consequence of the reasoning in *Employment Division v. Smith*, 494 U.S. 872 (1990), was the creation of a perverse incentive for governments to pass laws of "general applicability"—that is, without exceptions—in order to avoid opening the door to First Amendment challenges. Congress passed RFRA specifically to correct this inherent bureaucratic bias against individualized determinations. *See O Centro*, 546 U.S. at 436 ("The Government's argument echoes the classic rejoinder of bureaucrats throughout history: If I make an exception for you, I'll have to make one for everybody, so no exceptions. But RFRA operates by mandating consideration, under the compelling interest test, of exceptions to 'rules of general applicability.'"). And Congress intended that if the other branches of government were not appropriately sensitive to the religious exercise rights of conscientious

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2012); *but see Diocese of Fort Wayne-S. Bend, Inc. v. Sebelius*, No. 1:12-CV-159 JD, 2013 U.S. Dist. LEXIS 180641, at *53 (N.D. Ind. Dec. 27, 2013) (assuming without deciding that interests were compelling); *Grace Schs. v. Sebelius*, No. 3:12-CV-459 JD, 2013 U.S. Dist. LEXIS 180576, at *48 (N.D. Ind. Dec. 27, 2013) (same).

objectors, "courts would recognize exceptions—that is how the law works." *O Centro*, 546 U.S. at 434 (citing 42 U. S. C. §2000bb–1(c) ("A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government.")). In so doing, RFRA re-imposed a rule that is comparable to the strict scrutiny test from *Sherbert v. Verner* as it pertains to all federal law. *O Centro*, 546 U.S. at 424; Religious Freedom Restoration Act of 1993, Pub. L. 103-141, § 2 (1993) (codified at 42 U.S.C. § 2000bb) *see also Yoder*, 406 U.S. at 220 ("A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion.") (citing *Sherbert*). In light of this strong preference for individualized determinations, the government must meet a particularly heavy burden when it asserts a compelling interest in uniformity itself, that is, that there should be no individualized determinations. *O Centro*, 546 U.S. at 436 (uniformity not compelling interest where government's claims rested on "slippery-slope concerns").

B. The contraceptive mandate is not uniform or comprehensive because the government exempts millions of persons and plans

The government principally relies on this Court's decision in *United States v. Lee*, 455 U.S. 252 (1982), one of the rare cases in which an interest in uniformity has been held to be compelling. In *Lee*, the Court concluded that there was a compelling governmental interest in refusing to permit a religious exemption to the Social Security tax for an Amish employer who objected to the

taxation on religious grounds. *Lee*, 455 U.S. at 258-59. The Court found a compelling governmental interest because of pervasive uniformity of the program—the participation of each employer and employee in Social Security was "mandatory and continuous," "indispensable to the fiscal vitality" of the scheme, and any individualized exemptions regime would be so "difficult, if not impossible, to administer" as to be "almost a contradiction in terms." 455 U.S. at 258-59.

In the cases at bar, the government arguing that the ACA constitutes a "comprehensive insurance system with a variety of benefits available to all participants." *Sebelius v. Hobby Lobby Stores, Inc. et al.*, No. 13-354, Br. of Pet'r at 38 (citing *Lee*, 455 U.S. at 258) (hereinafter "Opening Br. of U.S."). Thus, according to the government, "individualized religion-based exemptions" to persons such as the Religious Claimants would "directly and materially harm" employees. Opening Br. of U.S. at 38. Moreover, the government argues, allowing exemptions would eliminate the employees' ability to sue these Religious Claimants for failing to provide the objectionable contraceptives. Opening Br. of U.S. at 38.

But "a law cannot be regarded as protecting an interest 'of the highest order' . . . when it leaves appreciable damage to that supposedly vital interest unprohibited." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993) (*quoting Florida Star v. B. J. F.*, at 541-542 (Scalia, J., concurring in part and concurring in judgment) (citation omitted)) (hereinafter "*Lukumi*"). Although the government claims that the ACA was intended to provide a right to preventive services without cost-sharing, that is, at no cost to the employees, its interest in providing those

contraceptives cannot be compelling because it leaves literally millions of persons, employed and otherwise, entirely on their own when it comes to purchasing contraceptives.[3] In a country of over three hundred

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3. The contraceptive mandate has always been at the periphery of the ACA, and its legislative history illustrates how peripheral the mandate truly is. To begin with, Congress did not specifically create a contraceptive mandate. Rather, the contraceptive mandate arises out of HHS's interpretation of the ACA's requirement to cover "preventive care and screenings." 42 U.S.C. § 300gg-13. That section provides for general preventive health services without cost sharing, including "evidence-based items" having a rating of "A" or "B" from the U.S. Preventive Services Task Force (USPTF), immunizations, and "evidence-informed" preventive care and screenings for infants, children, and adolescents. *Id.* For women, in particular, Congress provided that the Health Resources and Services Administration (HRSA) would "support" comprehensive guidelines for "additional preventive care and screenings not described in paragraph (1)" of the section, that is, evidence-based items or services rated by the USPTF. 42 U.S.C. § 300gg-13(a)(4). HRSA, without notice-and-comment rulemaking, later published these binding "comprehensive guidelines" on a website, not the Federal Register. Health Resources and Services Administration, Women's Preventive Services Guidelines, http://www.hrsa.gov/womensguidelines/ (last visited Jan. 27, 2014).

Although Congress did not define "preventive care and screenings" explicitly, it used parallel language in the same section, namely, "breast cancer screening, mammography, and prevention," 42 U.S.C. § 300gg-13(a)(5), suggesting that Congress had in mind the prevention of disease, rather than pregnancy. This suggestion is amplified by Congress's explicit references to contraceptives elsewhere in the ACA, namely, in provisions regarding sex education. Section 513, for instance, refers to contraception five times. Affordable Care Act, Pub. L. 111-148, § 513 (2010) (codified at 42 U.S.C. § 713). In addition, when the ACA refers to preventive services elsewhere, it does so in connection

million, the Tenth Circuit Court of Appeals estimated that the contraceptive mandate did not "presently" extend to even "tens of millions" of people, *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1143 (10th Cir. 2013) (en banc). Whatever the exact number of persons left uninsured, the reach of the ACA and its contraceptive mandate is so underinclusive that uniformity of coverage cannot be considered a "compelling interest." The ACA was not intended or expected to create a "comprehensive" and uniform scheme like Social Security. In fact, it leaves millions of persons uninsured *by design*, exempts millions of small employers from the contraceptive mandate *by design*, and exempts millions of "grandfathered" plans from the contraceptive mandate *by design*. These features, all of which are major structural components of the ACA, fatally undermine the government's contention that the ACA is a uniform and comprehensive system within the meaning of *United States v. Lee*.

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with diseases. *See* 42 U.S.C. § 18022(b)(1) (distinguishing between "Maternity and newborn care" and "Preventive and wellness services and chronic disease management"). Likewise, although the congressional record contains incidental references to contraception, the vast majority of discussion anticipated the measures for prevention of diseases like cancer, not normal and healthy conditions like pregnancy. 155 Cong. Rec. S12,114-31, S12,143-44 (2009) (statements of Sens. Feinstein, Vitter, Brown, Coburn, Merkley, Murkowski, Enzi, Baucus, Whitehouse, Burris, & Ensign).

1. The ACA was always expected to leave millions of Americans uninsured, and therefore outside the scope of the contraceptive mandate

Quite apart from the specifics of the employer contraceptive mandate, the ACA has always been expected to leave tens of millions of persons uninsured, and thus outside the scope of the contraceptive mandate. In its March 20, 2010 evaluation of the ACA, for instance, the Congressional Budget Office (CBO) predicted that the proportion of the insured among the nonelderly, non-unauthorized-immigrant population would rise from approximately 81% to 92% by 2016, where it would remain flat through the end of the projected 10-year time horizon, thus leaving—even under the rosiest estimates—approximately 23 million nonelderly persons uninsured. Letter from Douglas W. Elmendorf, Director, Congressional Budget Office, to Hon. Nancy Pelosi, at tbl.4 (Mar. 20, 2010), *available at* http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/113xx/doc11379/amendreconprop.pdf (last visited Jan. 27, 2014). The May 2013 estimates of coverage are less optimistic, estimating a stable uninsured rate of between 30 and 31 million nonelderly persons. Congressional Budget Office, Effects on Health Insurance and the Federal Budget for the Insurance Coverage Provisions in the Affordable Care Act—May 2013 Baseline, tbl.1 (2013), *available at* http://www.cbo.gov/publication/44190 (last visited January 27, 2014); *see also* Associated Press, Poll Finds Drop in Uninsured Rate, Jan. 23, 2014 (16.1 percent of U.S. adults remain uninsured), *available at* http://bigstory.ap.org/article/apnewsbreak-poll-finds-drop-uninsured-rate (last visited Jan. 27, 2014). Thus, even after the projected

"transitional" period, at least 30 million nonelderly persons will remain uninsured, and therefore beyond the reach of a supposedly "uniform" contraceptive mandate. *Id.*

Indeed, many of these individuals will also be exempted from paying the individual shared responsibility payment that is the chief incentive for requiring individuals to purchase coverage. HealthCare.gov, How do I qualify for an exemption from the fee for not having health coverage?, https://www.healthcare.gov/exemptions/ (last visited Jan. 27, 2014). And although individual coverage was expected to cover contraceptives, on December 19, 2013, the government announced that individuals whose insurance plans were canceled would be exempted from the individual mandate under the mandate's "hardship exemption" for an additional year. *See* Ezra Klein, The individual mandate no longer applies to people whose plans were canceled, Wonkblog, Dec. 19, 2013, http://www.washingtonpost.com/blogs/wonkblog/wp/2013/12/19/the-obama-administration-just-delayed-the-individual-mandate-for-people-whose-plans-have-been-canceled/ (last visited Jan. 27, 2014). Thus the number of individuals without insurance, and by extension without the "uniform" coverage for contraceptives, will likely be even larger than the CBO estimates initially suggested.

2. The ACA does not require millions of small employers to comply with the contraceptive mandate

Congress also exempted "small employers" (businesses having the equivalent of fewer than 50 full-time employees) from tax penalties associated with failing to provide health coverage, thus relieving them entirely from the

contraceptive mandate. *See* 26 U.S.C. § 4980H(c)(2) (exempting employers having fewer than 50 full-time employees); *Newland*, 881 F. Supp. 2d at 1297. These employers represent millions of Americans. According to the latest figures from the U.S. Census Bureau, in 2011, 51,504,770 people worked for 10,574,412 employers having fewer than 50 employees.[4] U.S. Census Bureau, *U.S. & States, NAICS Sectors, Small Employment Sizes* (2011), *available at* http://www2.census.gov/econ/susb/data/2011/us_naicssector_large_emplsize_2011.xls (last visited Jan. 27, 2014). If any one of these millions of small employers chooses not to provide health insurance, their employees may independently buy health insurance that complies with the contraceptive mandate through an exchange. *See* Opening Br. of U.S. at 56.

Under Social Security, by contrast, there was no such flexibility. As the Court observed in *Lee*, some of the Social Security taxes were paid by the employees through withholding and some were paid by the employers through an excise tax, but the taxes were truly uniform. *Lee*, 455 U.S. at 254 n.1 (discussing uniformity of federal Social Security and unemployment taxes). Today, nearly all employment compensation is taxable, and nearly every employer must collect Social Security taxes, even those who are self-employed or have household employees. *See generally* 26 U.S.C. § 1402 (self-employment tax); 26 U.S.C. § 3101 *et seq.* (Federal Insurance Contributions

4. Some portion of these small employers will be classified as "large" under the ACA because the 50-employee threshold is calculated based on the number of "full-time equivalent" employees (FTEs), not the number of actual employees, thus sweeping into the employer mandate an unknown number of employers having fewer than 50 full-time employees. *See* 26 U.S.C. § 4980H(c)(2).

Act); *see also* Internal Revenue Service, Publication 926, Household Employer's Tax Guide 3-7 (2014) (discussing obligations of household employers), *available at* http://www.irs.gov/pub/irs-pdf/p926.pdf (last visited Jan. 27, 2014).

In contrast, the ACA gives the employers of these millions of small-business employees the flexibility to determine whether or not to provide health insurance, with the effect that coverage provided by such small employers need not even be "mandatory and continuous." *Lee*, 455 U.S. at 258-59. It is therefore hard to see what compelling interest is served by forcing the Religious Claimants to supply objectionable contraceptives for their employees when the law has provided millions of non-religious small businesses with the option to not supply health insurance at all.[5]

3. The ACA permits millions of plans to be "grandfathered" into the new system without complying with the contraceptive mandate

Congress chose to allow millions of plans that do not comply with the contraceptive mandate to be "grandfathered" and thus exempted from the contraceptive mandate. *See* 42 U.S.C. § 18011; *Newland*

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5. The CBO predicted that the ACA will result in approximately 7 million fewer individuals being covered by employment-based plans over the next ten years. Congressional Budget Office, Effects on Health Insurance and the Federal Budget for the Insurance Coverage Provisions in the Affordable Care Act—May 2013 Baseline, tbl.1 (2013), *available at* http://www.cbo.gov/publication/44190 (last visited Jan. 27, 2014).

v. Sebelius, 881 F. Supp. 2d 1287, 1291 (D. Colo. 2012) ("Unlike some other provisions of the ACA, however, the preventive care coverage mandate does not apply to certain healthcare plans existing on March 23, 2010. This gap in the preventive care coverage mandate is significant. According to government estimates, 191 million Americans belong to plans which may be grandfathered under the ACA." (citations omitted)); *Conestoga Wood Specialties v. Sec'y of the U.S. Dept. of Health & Human Svcs.*, 724 F.3d 377, 414 (3d Cir. 2013) (Jordan, J., dissenting) (citing *Newland v. Sebelius*, 881 F. Supp. 2d 1287, 1298 n.13 (D. Colo. 2012)); Interim Final Rules for Group Health Plans and Health Insurance Coverage Relating to Status as a Grandfathered Health Plan Under the Patient Protection and Affordable Care Act, 75 Fed. Reg. 34,538, 34,550, 34,555-56 (June 17, 2010).

The government describes the function of "grandfathering" as "allowing a transition period" for compliance, Opening Br. of U.S. at 53. In a sense, this is true. The ACA is designed to work as an incentive scheme, providing tax incentives for the purchase of insurance, either by employers or by individuals. But although the government expected "grandfathered" plans to disappear because employers were influenced by the ACA's incentives, this is an incentive scheme, not a mandatory-compliance scheme like Social Security. And it appears that "grandfathered" plans have lasted much longer than anticipated. Estimates on the Department of Health & Human Services (HHS) website last summer indicated that health plans exempted through "grandfathering" still covered at least 50 million people, and perhaps twice that number. HealthCare.gov, Keeping the Health Plan You Have: The Affordable Care Act and "Grandfathered"

Health Plans (June 20, 2013), *archived at* https://web.archive.org/web/20130620171510/http://www.healthcare.gov/news/factsheets/2010/06/keeping-the-health-plan-you-have-grandfathered.html (last visited Jan. 27, 2014) ("Most of the 133 million Americans with employer-sponsored health insurance through large employers will maintain the coverage they have today.... The 133 million Americans with employer-sponsored health insurance through large employers (100 or more workers)—who make up the vast majority of those with private health insurance today—will not see major changes to their coverage as a result of this regulation. This regulation affirms that most of these plans will remain grandfathered—more than three-quarters of firms in 2011—based on the way they changed cost sharing from 2008–2009."); *see also* Interim Final Rules for Group Health Plans and Health Insurance Coverage Relating to Status as a Grandfathered Health Plan Under the Patient Protection and Affordable Care Act, 75 Fed. Reg. 34,538, 34,553 (June 17, 2010) (describing projections for grandfathered status).

As the district court observed in *Newland*, "[a]lthough there are many requirements for maintaining grandfathered status, if those requirements are met a plan may be grandfathered for an *indefinite period of time*." 881 F. Supp. 2d at 1291 (citations omitted, emphasis added). The government thus provided the *option* of noncompliance with the contraceptive mandate for millions of plans. And even assuming that most "grandfathered" plans would eventually be cancelled or lose "grandfathered" status, millions of persons would still have been left uncovered by the contraceptive mandate in "grandfathered" plans for a significant period of time. *Beckwith Electric Co. v. Sebelius*, No. 8:13-cv-648-T-17MAP, 2013 U.S. Dist. LEXIS

94056, at *58 (M. D. Fla. June 25, 2013) (best case scenario about lost grandfathering by the end of 2013 "still leaves roughly a third of America's population (i.e., 100 out of 313.0 million) exempt from the contraceptive mandate."); *Newland*, 881 F. Supp. 2d at 1298 n.13 (citing 75 Fed. Reg. 34,538, 34,553). The ACA cannot be "comprehensive" or uniform if it exempts millions of others from the unique conscience burdens that HHS has placed on the Religious Claimants. *Hobby Lobby Stores, Inc.*, 723 F.3d at 1143.

The government has yet to seriously explain how granting religious exemptions to the Religious Claimants would undercut the overall provision of health insurance. After all, the Religious Claimants provided health insurance to their employees out of religious obligation even before the ACA required them to do so. *Conestoga Wood Specialties, Inc. v. Sebelius*, No. 13-356, Br. of Pet'rs at 5; *Sebelius v. Hobby Lobby Stores, Inc.*, No. 13-354, J.A. at 138-40. Their objection is not to the ACA overall, but is limited instead to a small class of contraceptives that they believe take human life. There is no reason to believe that the government cannot exempt these Religious Claimants from such a small subset of contraceptives when it has simultaneously ensured that multitudes of others remain entirely outside the scope of the contraceptive mandate.

C. Individualized religious exemptions to the contraceptive mandate are easily administrable

The *Lee* court described religious exemptions to Social Security taxes as "difficult, if not impossible, to administer" and concluded that the government interest in a uniform application of the law was thus very high. 455 U.S. at 258-59. But "[i]ndividualized *religion-based*

exemptions" to the ACA would not be administratively unworkable, as evidenced by the various other forms of exemptions already being administered. Opening Br. of U.S. at 38 (emphasis added).

First, HHS has already created a process to administer individualized exemptions for certain non-religious persons and some religious conscientious objectors. 45 C.F.R. § 147.131(a). In mid-2013, after an initial attempt to define "religious employers" so narrowly as to exclude nuns serving the non-Catholic poor, *see* 45 C.F.R. § 147.130(a)(i)(iv)(B), HHS issued a new rule setting forth a process for granting religious exemptions to organizations that conscientiously object to providing contraceptives. *See* Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 39,870 (July 2, 2013); *Korte v. Sebelius*, 735 F.3d 654, 661-62 (7th Cir. 2013) (discussing evolving definition of "religious employer" exempted from contraceptive mandate). And one of the two explicit exemptions for religious individuals is highly individualized, requiring submission of a five-page application for relief. Centers for Medicare & Medicaid Services, OMB No. 0938-1190, Application for Exemption from the Shared Responsibility Payment for Members of Recognized Religious Sects or Divisions http://marketplace.cms.gov/getofficialresources/publications-and-articles/religious-sect-exemption.pdf (last visited Jan. 27, 2014). It is simply counterfactual for the government to claim that administering individualized "religion-based" exemptions is unworkable because the government *already designed a mechanism to do just that*. The Court should therefore reject the government's dubious assertion that administering *all* individualized exemptions for *religious* objectors would somehow be catastrophic.

Second, and as noted above, persons whose plans were cancelled *as designed by the ACA* will be exempted under the "hardship" exemption and are therefore beyond the incentives of the individual mandate. *See supra* at 10.

Third, HHS has selectively crafted other individualized non-religious exemptions. Centers for Medicare & Medicaid Services, *How do I qualify for an exemption from the fee for not having health coverage?, available at* https://www.healthcare.gov/exemptions/ (last visited Jan. 27, 2014). In such cases, the interest asserted to justify differential treatment is not compelling. *See Lukumi*, 508 U.S. at 546-47 ("Where government restricts only conduct protected by the First Amendment and fails to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort, the interest given in justification of the restriction is not compelling.").

In addition to being unfair, this process creates the public perception that such exemptions will be granted selectively and preferentially to discriminate against religious beliefs. *Cf.* John D. McKinnon & Corey Boles, IRS Apologizes for Scrutiny of Conservative Groups, The Wall Street Journal, May 10, 2013, http://online.wsj.com/news/articles/SB10001424127887323744604578474983310370360 (last visited Jan. 27, 2014). For example, the government has selectively modified its regulations to accommodate favored employers. On January 10, 2014, for instance, the U.S. Department of Treasury announced that volunteer firefighter departments and emergency responders would be allowed to avoid classification as "large employers" by not counting volunteer hours toward the average number of hours worked by their employees. *See* U.S. Department

of the Treasury, *Treasury Ensures Fair Treatment for Volunteer Firefighters and Emergency Responders Under the Affordable Care Act* (Jan. 10, 2014), *available at* http://www.treasury.gov/connect/blog/Pages/Treasury-Ensures-Fair-Treatment-for-Volunteer-Firefighters-and-Emergency-Responders-under-the-Affordable-Care-Act-Under-ACA.aspx (last visited Jan. 17, 2014). In addition, the HHS waiver process raised selectivity concerns in May 2011 after one news outlet reported that nearly 20 percent of ACA waivers granted in April 2011 were issued to entertainment establishments located in House Minority Leader Nancy Pelosi's congressional district. Matthew Boyle, Nearly 20 percent of new Obamacare waivers are gourmet restaurants, nightclubs, fancy hotels in Nancy Pelosi's district, The Daily Caller, May 17, 2011, http://dailycaller.com/2011/05/17/nearly-20-percent-of-new-obamacare-waivers-are-gourmet-restaurants-nightclubs-fancy-hotels-in-nancy-pelosi%E2%80%99s-district/ (last visited Jan. 27, 2014). RFRA and the First Amendment require at least that much consideration for religious beliefs.

D. The Tenth Circuit properly concluded that the government failed to carry its burden to show a compelling interest in supplying free contraceptives to third parties

The government also argues that it has a compelling governmental interest in denying all religious exemptions to the contraceptive mandate because any such exemptions would harm the employees of the Religious Claimants. Opening Br. of U.S. at 38. This argument is hard to take seriously in light of the literally *millions* of uninsured who, as explained above, are left entirely untouched by the

contraceptive mandate. The government is also factually incorrect in saying that the Tenth Circuit "believed that the interests of corporate-respondents' employees are entitled to no weight under RFRA[.]" Opening Br. of U.S. at 39; *see also Sebelius v. Hobby Lobby Stores, Inc. et al.*, No. 13-354, Pet. for Writ of Cert. at 28 ("short shrift"). In fact, the Tenth Circuit explicitly considered those interests and found the government's explanation lacking:

> Finally, we note a concern raised both at oral argument and in the government's briefing that Hobby Lobby and Mardel are, in effect, imposing their religious views on their employees or otherwise burdening their employees' religious beliefs. But Hobby Lobby and Mardel do not prevent employees from using their own money to purchase the four contraceptives at issue here.
>
> Of course, employees of Hobby Lobby and Mardel seeking any of these four contraceptive methods would face an economic burden not shared by employees of companies that cover all twenty methods. But the government must show why the employees' burden creates a compelling interest *that can only be met by requiring the corporations to conform to a mandate.*

Hobby Lobby Stores, Inc., 723 F.3d at 1144 (emphasis added). In other words, the government failed to carry its burden of proving that the contraceptive mandate was the least restrictive means to further its interest, i.e., that there was no other conduit to supply *these* contraceptives except through *these* Religious Claimants. The Tenth

Circuit was simply applying strict scrutiny as this Court applied it in *Yoder* and *Lee*. *Yoder*, 406 U.S. at 210-13, 215-18, 222 (discussing effects of schooling exemption on Amish children); *Lee*, 455 U.S. at 259-60 (Social Security tax was least restrictive means to provide for comprehensive insurance paid for by employers and employees). And the Tenth Circuit was correct: the government has never adequately explained why it must force the Religious Claimants to provide contraceptives when it could either provide contraceptives directly or subsidize contraceptive-covering insurance without implicating the Religious Claimants' sincerely-held beliefs.

II. The existence of a cause of action under ERISA for contraceptive mandate beneficiaries does not constitute a compelling interest

A. The government's ERISA argument would render RFRA meaningless and easily circumventable

The government also asserts (apparently for the first time in this litigation) that the existence of a statutory cause of action for enforcement under ERISA constitutes a compelling governmental interest. Opening Br. of U.S. at 38, 42-44 ("Congress provided those plan participants and beneficiaries a privately-enforceable right to coverage of recommended preventive services without cost sharing. RFRA relief for respondents would extinguish that right[.]"). But like the Free Exercise Clause, RFRA provides a claim *and* defense applicable to federal laws enacted either before or after RFRA unless explicitly indicated otherwise. 42 U.S.C. §§ 2000bb-1(c), 2000bb-3(a)-(b). And RFRA also applies against non-government

actors when they wield the power of the government, such as in an enforcement capacity. *See* 42 U.S.C. § 2000bb-2(1) (defining "government" to include any "other person acting under color of law"). Thus, Congress intended for RFRA to mandate strict scrutiny for any "rule of general applicability" that creates a substantial burden, whether ERISA or something else.

The government's argument, although obscure on this point, appears to imply that the simple existence of a freestanding statutory cause of action under ERISA *necessarily* constitutes a compelling interest. Opening Br. at 38-46. That can't be right because under the government's view, the government could always win the "compelling interest" argument by creating a statutory cause of action to be pursued by private parties, even when it could not pursue that cause of action directly. *Cf. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694 (2012). Under the government's argument, for instance, RFRA would apply to government-initiated lawsuits under a federal statute allowing injunctions against interstate travel to and from a house of worship, but RFRA would not apply to an action by private parties under the same cause of action. This is an absurd result and in any event, is not the law. *See* Shruti Chaganti, Note, *Why The Religious Freedom Restoration Act Provides A Defense In Suits By Private Plaintiffs*, 99 Va. L. Rev. 343, 355-58 (2013) (discussing significant legislative history and structural support for interpreting of RFRA to allow for defense against non-governmental plaintiffs. To the contrary, RFRA explicitly protects against non-government persons "acting under color of law." *See* 42 U.S.C. § 2000bb-2(1) (defining "government"). Moreover, the government's argument would render

meaningless the statutory directive that RFRA may be used "as a claim or defense in a judicial proceeding[.]" 42 U.S.C. § 2000bb-1(c). *See, e.g., Bilski v. Kappos*, 130 S. Ct. 3218, 3228-29 (2010) (noting canon against interpreting statutory provisions in a manner that renders another provision superfluous).

B. The government misconstrues a circuit split regarding RFRA's applicability to lawsuits by private parties

Already far afield in search of an argument, and presumably in an effort to give substance to its claim that preserving a statutory cause of action under ERISA is a compelling interest, the government inaccurately describes the circuit split on whether RFRA would apply to enforcement claims brought by private persons under ERISA.[6] The government's opening brief states squarely that "[t]he majority of courts of appeals to address that question have held that it does not." Opening Br. at 43. This is not an accurate representation of circuit authority. Limiting the question to cases addressing the question of whether RFRA can apply in suits brought by private parties under federal dual-enforcement statutes (such as ERISA), the circuit split is 3–0 *in favor of* applying RFRA. And at the much broader level of generality that the government invokes, "whether RFRA applies in litigation between private parties," Opening Br. at 43, the circuit split is 4–1 *in favor of* applying RFRA. *Compare*

6. Although the Court need not resolve the circuit split in this case, it is worth noting that RFRA was designed to broadly protect religious liberty against both public and private encroachments. *See generally* Chaganti, 99 Va. L. Rev. at 348-55 (discussing history and structure of RFRA).

Hankins v. Lyght, 441 F.3d 96, 109 (2d Cir. 2006) (RFRA applies); *Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 834, 837-43 (9th Cir. 1999) (RFRA applies against private parties "acting under color of law"); *EEOC v. Catholic Univ. of America*, 83 F.3d 455, 467-70 (D.C. Cir. 1996) (RFRA applied against government and individual plaintiff); *In re Young*, 82 F.3d 1407, 1416-17 (8th Cir. 1996) (RFRA applied against federal bankruptcy trustee); *with General Conf. Corp. v. McGill*, 617 F.3d 402 (6th Cir. 2010) (RFRA did not apply against private plaintiff); *see also Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036, 1042-43 (7th Cir. 2006) (Posner, J.) (commenting that RFRA would not apply against private plaintiff although issue not raised or briefed).

1. Four courts of appeal have held that RFRA applies to statutes creating private causes of action

In *In re Young*, the Eighth Circuit held that RFRA amended bankruptcy law and in the process, applied RFRA to all federal bankruptcy courts. 82 F.3d 1407, 1416-17 (8th Cir. 1996), *vacated* 521 U.S. 1114 (1997), *reinstated* 141 F.3d 854 (8th Cir. 1998), *cert. denied* 525 U.S. 811 (1998). As the Eighth Circuit reasoned there, the law to be applied was federal, the courts applying the law were "a branch . . . of the United States," *see* 42 U.S.C. § 2000bb-2(1), and the court's decision would involve implementation of federal law. 82 F.3d at 1417. As such, *In re Young* suggests that RFRA applies by its terms to all cases based on federal law and involving federal courts.

A little more than a week later, in *EEOC & Elizabeth McDonough v. The Catholic Univ. of America*, the D.C.

Circuit applied RFRA to a lawsuit by both EEOC and a private litigant under Title VII. 83 F.3d at 467-70. In that case, Sister Elizabeth McDonough filed a charge with the EEOC alleging sex discrimination and retaliatory conduct under Title VII. After an investigation, EEOC and Sister McDonough sued Catholic University, and post-trial, the district court ordered dismissal under the ministerial exception. *Id.* at 459-60. On appeal, the D.C. Circuit affirmed the dismissal on three alternative holdings, two under the ministerial exception (later clarified in *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. at 710 (2012)), and the third under RFRA. 83 F.3d at 465, 467-70. The D.C. Circuit hinted that its preferred holding was under RFRA, noting that if the university were correct that RFRA applied, "it wins the case on this basis alone[.]" *Id.* at 467-68.

In 1999, the Ninth Circuit recognized that RFRA can apply against private persons who act "under color of law." *Sutton*, 192 F.3d at 826; *see also* 42 U.S.C. § 2000bb-2(1) (defining "government"). In *Sutton*, the plaintiff sued an employer under RFRA for religious discrimination because he refused to provide a Social Security number for religious reasons. *Sutton*, 192 F.3d at 829-30. Although the Ninth Circuit ultimately concluded that the plaintiff had failed to properly invoke the nexus showing state action, the court explicitly held that the proper test for determining whether a person is "acting under color of law" within the meaning of RFRA is whether they would be "acting under color of law" under 42 U.S.C. § 1983. *Id.* at 834-35. The court went on to list a series of cases in which private parties had been found to be "acting under color of law" under 42 U.S.C. § 1983. *Id.* at 837-43. Thus, the Ninth Circuit held that RFRA does apply as a claim

or defense in a lawsuit between private parties so long as the party invoking RFRA properly shows that the opposing party is "acting under color of law." 42 U.S.C. § 2000bb-2(1).

In *Hankins v. Lyght*, the Second Circuit squarely held that RFRA "easily covers" a lawsuit between private parties under the Age Discrimination in Employment Act (ADEA). 441 F.3d at 103, 109. *Hankins* involved a lawsuit by a Methodist minister against a denomination that had forced him to retire after 70 years of age. Although the ministerial exception would have disposed of the case, Second Circuit law on the status of the exception was unresolved at the time. *Hankins*, 441 F.3d at 102. Instead of resolving the constitutional question, therefore, the Second Circuit resolved the case under RFRA, concluding that the RFRA "could not be more on point" because its broad language encompassed lawsuits against a private party under a federal statute[7] that allows for government enforcement. *Hankins*, 441 F.3d at 102. Rejecting an interpretation advanced by the dissent that did not account for RFRA's explicit authorization to invoke the statute against individuals "acting under color of law," the Second Circuit found special significance in the fact that the ADEA allows both private and public enforcement actions. *Id.* at 103-04. On remand, the district court concluded that RFRA's compelling interest test required the same result as the ministerial exception and dismissed the suit. *Hankins v. N.Y. Ann. Conf. of the United Methodist*

7. The Second Circuit also noted the existence of lower court opinions allowing parties to raise RFRA defenses in private litigation, even though the RFRA defenses failed on their merits. *Hankins*, 441 F.3d at 103 n.4 (collecting cases).

Church, 516 F. Supp. 2d 225, 237-38 (E.D.N.Y. 2007), *aff'd* 351 F. App'x 489 (2d Cir. 2009) (summary order). Despite one subsequent critical opinion, *Rweyemamu v. Cote*, 520 F.3d 198, 203-04 (2d Cir. 2008) (expressing skepticism but not revisiting the issue), *Hankins* is good law in the Second Circuit. *See, e.g.*, *United States v. Ianniello*, 808 F.2d 184, 190 (2d Cir. 1986) ("This court is bound by a decision of a prior panel unless and until its rationale is overruled, implicitly or expressly, by the Supreme Court or this court *en banc*."), *overruled on other grounds by United States v. Indelicato*, 865 F.2d 1370, 1375-76 (2d Cir. 1989) (*en banc*).

2. Only one court of appeals has directly held that RFRA does not apply to private suits

In *General Conference Corporation v. McGill*, the Sixth Circuit concluded that RFRA did not apply to a trademark infringement lawsuit brought by one religious entity against another. 617 F.3d at 412. Yet *McGill* is distinguishable because it did not involve a dual-enforcement statute allowing suit "under color of law," such as ERISA or ADEA, but rather an intellectual property statute. *Id.* at 410-12. The Sixth Circuit also relied on dubious readings of the existing authority, mistakenly claiming that a Ninth Circuit case had "reached the issue" of whether RFRA applies to suits by private parties when the Ninth Circuit said that it "need not decide this knotty question" because it could dispose of the case on other grounds. *Worldwide Church of God v. Philadelphia Church of God, Inc.*, 227 F.3d 1110, 1121 (9th Cir. 2000) (plaintiff failed to show substantial burden). Likewise, the Sixth Circuit mistakenly interpreted *Sutton* to hold that RFRA does not apply to suits between private

parties generally, even though *Sutton* actually said that RFRA would apply as long as the plaintiff could show that the private party was "acting under color of law." *Sutton*, 192 F.3d at 834-43.[8]

III. A governmental interest cannot be "compelling" where it is general and unparticularized

Under the strict scrutiny mandated by RFRA, the Court rejects the "categorical approach" and looks "beyond broadly formulated interests" asserted to scrutinize "the asserted harm of granting specific exemptions to particular religious claimants[,]" on a case-by-case basis. *O Centro*, 546 U.S. at 430-31 (citing *Grutter v. Bollinger*, 539 U.S. 306, 327 (2003) and *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 228 (1995)); *Yoder*, 406 U.S. at 228-29 (state's interest in compelling school attendance by Amish children less substantial than requiring such attendance for children generally); *cf. Cal. Democratic Party v. Jones*, 530 U.S. 567, 584 (2000) (compelling interest analysis "is not to be made in the abstract, by asking whether fairness, privacy, etc., are highly significant values; but rather by asking whether the aspect of fairness, privacy, etc., addressed by the law at issue is highly significant."). The text of RFRA makes the individualized nature of

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8. *McGill* cited *Tomic v. Catholic Diocese of Peoria*, a Seventh Circuit case in which the court stated in *dicta* that RFRA would not apply as a defense in an ADEA case, even though no party had briefed or relied on the RFRA issue and the court had already concluded that the ministerial exception disposed of the case. 442 F.3d 1036, 1042-43 (Posner, J). Even interpreting *Tomic* to reach the RFRA issue, the circuit split only becomes slightly less lopsided, 4-2 in favor of applying RFRA to suits between private parties.

the inquiry clear: RFRA requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person'—the particular claimant whose sincere exercise of religion is being substantially burdened. *O Centro*, 546 U.S. at 430-31. Thus the Court must determine whether granting an exemption from a small number of contraceptives to these particular claimants would be among "the gravest abuses, endangering paramount interests" that could justify the burden on the claimants' religious exercise. *Sherbert*, 374 U.S. at 406 (quoting *Thomas v. Collins*, 323 U.S. 516, 530 (1945)). The government's asserted interests in public health and equal access to contraceptives, however, are so vague and expansive that they cannot justify application of the contraceptive mandate to these particular Religious Claimants.

A. The asserted governmental interest in public health is general and unparticularized to the Religious Claimants

As the Tenth Circuit observed, the "the government offers almost no justification for not 'granting specific exemptions to particular religious claimants.'" *Hobby Lobby Stores, Inc.*, 723 F.3d at 1143 (citing *O Centro*, 546 U.S. at 431). Indeed, signaling the weakness of its case on this point, the government uses capacious adverbs to describe how the contraceptive mandate advances a governmental public health interest: "directly," "materially," and "tangibly." Opening Br. of U.S. at 46, 48. To support its asserted compelling interest in "public health," the government then cites a list of general facts about unintended pregnancies, birth spacing, and other health benefits. Opening Br. of U.S. at 46-48. In short,

the governmental interest amounts to: Contraceptives are good and the contraceptive mandate increases their usage. In a brief feint toward particularity, the government notes that "contraceptive methods are not interchangeable" and goes on to note features of several of the challenged contraceptives. Opening Br. of U.S. at 48.

But strict scrutiny requires more than such generalities. In *O Centro*, for instance, the Court rejected a similar set of interests advanced by the challenged law because they were too general and failed to take relevant differences into account. 546 U.S. at 432-33 (rejecting "general characteristics of Schedule I substances," "high potential for abuse," lack of accepted medical use, and lack of acceptable safety guidelines). Here, likewise, the government's asserted interest in "public health" has been articulated as a "broadly formulated interest[] justifying the general applicability" of the ACA. *Hobby Lobby Stores, Inc.*, 723 F.3d at 1143-44 (citing *O Centro*, 546 U.S. at 431).

1. The government identifies no special need on the part of the Religious Claimants' employees

There is no indication that the Religious Claimants' employees are specially lacking in contraceptives, or that they would benefit from contraceptives more than the millions of Americans whom the ACA—by its very design—leaves either uninsured or exempted. In short, the government's arguments on this point are so general that finding a compelling interest here would effectively nullify the burden of proof that RFRA places squarely on the government. 42 U.S.C. §§ 2000bb-1(b), 2000bb-2(3).

2. The government's asserted interest is limitless

Nor has the government articulated a limiting principle for its interest in public health or a threshold at which it would achieve success. *Cf. Fisher v. Univ. of Texas*, 133 S. Ct. 2411, 2419 (2013) (requiring "reasoned, principled explanation" for the objective identified by the government). The resulting governing principle is, in essence, "more." But "the government does not have a compelling interest in each marginal percentage point by which its goals are advanced." *See Brown v. Entm't Merch. Ass'n*, 131 S. Ct. 2729, 2741 n.9 (2011); *Grutter v. Bollinger*, 539 U.S. 306, 361 (2003) ("[E]ven if the Law School's racial tinkering produces tangible educational benefits, a marginal improvement in legal education cannot justify racial discrimination where the Law School has no compelling interest in either its existence or in its current educational and admissions policies.").

The absence of a limiting principle is particularly troubling here because the government is asserting a generalized *federal* interest in "public health." Opening Br. of U.S. at 46. In the Constitution's federal scheme, however, the promotion of public health has generally been a matter for the States' police power. *See Jacobson v. Massachusetts*, 197 U.S. 11, 27-28 (1905). And even State police powers are susceptible to particularized constitutional scrutiny to ensure that public health action reaches only as far as the "necessities of the case," *id.* at 28, even requiring judicial relief where the public health action is exercised in an "arbitrary, unreasonable manner, or might go so far beyond what was reasonably required for the safety of the public[.]" *Id.* In the necessities of this

case, the contraceptive mandate goes well beyond any governmental interest in providing free contraceptives to the public. And there is no evidence that the contraceptive mandate is tailored to a particular exigency.

B. The asserted governmental interest in equal access to contraceptives is general and unparticularized

The asserted governmental interest in "equal access to recommended health-care services" fails on similar grounds. Opening Br. of U.S. at 49. The government then proceeds to explain why *preventive services* are important, citing statistics about the disproportionate costs of healthcare for men versus women. *Id.* at 49-50. But the government does not explain what proportion of this disparity is attributable to lack of funding for contraceptives, either generally or with respect to the contraceptives at issue in these cases. As noted in the courts of appeals, these Religious Claimants take issue with only a small subset of the HHS-mandated services. *See Hobby Lobby Stores, Inc.*, 723 F.3d at 1125 (4 out of 16); *Conestoga Wood Specialties Corp. v. Sebelius*, 724 F.3d 377, 392 n.1 (3d Cir. 2013) (Jordan, J., dissenting).

Moreover, the question before the Court is not whether preventive services are important generally or whether medical costs could be more evenly distributed. Of course they are, and of course they could. Rather, the question is whether third-party funding of the particular subset of contraceptives challenged by *these Religious Claimants* is so important that they must be forced to provide them against their religious beliefs. *See O Centro*, 546 U.S. at 432-33.

And as important as equality is, this Court has never held that the government is under an affirmative obligation to fund activities that are generally protected against government invasion. In *Harris v. McRae*, for instance, the Court rejected the contention that because *Roe v. Wade* recognized a right to abortion, there must be a constitutional right to funding for such abortions:

> Although the liberty protected by the Due Process Clause affords protection against unwarranted government interference with freedom of choice in the context of certain personal decisions, it does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom. To hold otherwise would mark a drastic change in our understanding of the Constitution. It cannot be that because government may not prohibit the use of contraceptives, or prevent parents from sending their child to a private school, government, therefore, has an affirmative constitutional obligation to ensure that all persons have the financial resources to obtain contraceptives or send their children to private schools.

448 U.S. 297, 317-18 (1980) (citations omitted); *see also Maher v. Roe*, 432 U.S. 464 (1977) (no Equal Protection violation for state to refuse to subsidize abortions); *Standridge v. Union Pac. R.R. Co.*, 479 F.3d 936 (8th Cir. 2007) (no Title VII sex discrimination where private company declined to provide contraception for either men or women). Had Congress determined that providing contraceptives was a compelling interest, it

could have used its powers of spending and taxation to provide contraceptives directly, much as it collects and distributes the general Social Security tax upheld in *Lee*. Congress did not do so. Instead, HHS crafted regulations that force the Greens, the Hahns, and their companies to provide contraceptives in violation of their religious faith. Whatever the government's interest in providing contraceptives generally, it does not have a compelling interest in forcing these Religious Claimants to provide them.

CONCLUSION

For the foregoing reasons, as well as those expressed in the Religious Claimants' briefs on the merits, *Amicus* requests that this Court reverse the judgment of the Court of Appeals for the Third Circuit and affirm the judgment of the Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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